

A **AZIMAH HAMZAH v. KETUA PENGARAH JABATAN
PENDAFTARAN NEGARA & ANOR**

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
VAZEER ALAM MYDIN MEERA JCA
B GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: W-01(A)-233-03-2020]
25 JANUARY 2023

C **Abstract:** *The legal principle is well-established that in order to be
conferred a citizenship by operation of law, the applicant must fulfil the
requirements under art. 14(1)(b) of the Federal Constitution ('FC') read
together with s. 1(e) of Part II, Second Schedule of the FC and must
discharge the burden of proof that he/she was not 'born a citizen of any
country'.*

D **ADMINISTRATIVE LAW:** *Exercise of administrative powers – Judicial review –
Application to quash decision to deny citizenship by operation of law – Whether
applicant fulfilled requirements of s. 1(e) of Part II, Second Schedule read with art.
14(1)(b) of Federal Constitution – Applicant born in Malaysia to Cambodian
E refugees – Whether identity and status of maternal and paternal connection
established – Whether stateless – Whether principle of jus sanguinis applicable*

F **CONSTITUTIONAL LAW:** *Citizenship – Citizenship by operation of law –
Application to quash decision to deny citizenship by operation of law – Whether
applicant fulfilled requirements of s. 1(e) of Part II, Second Schedule read with
art. 14(1)(b) of Federal Constitution – Applicant born in Malaysia to Cambodian
refugees – Whether identity and status of maternal and paternal connection
established – Whether stateless – Whether principle of jus sanguinis applicable*

G The appellant was born on 3 June 1986 at the Cherating Refugee Camp,
Kuantan, Pahang. Her parents were both refugees from Cambodia. They had
since been naturalised as Malaysian citizens. The appellant, who had lived
in Malaysia since birth, is now a permanent resident. The appellant's
application for a Malaysian citizenship pursuant to art. 14(1)(b) of the
Federal Constitution ('FC') read together with s. 1(e) of Part II, Second
H Schedule of the FC was rejected by the respondents. The appellant, therefore,
commenced a judicial review application to quash the decision by way of an
order of *certiorari* and an order of *mandamus* directing the first respondent to
issue the MyKad or Certificate of Confirmation of Citizenship that
recognised the appellant as a Malaysian citizen by operation of law under
I art. 14(1)(b) of the FC. The High Court, finding that the appellant had failed
to fulfil the requirements of s. 1(e) of Part II, Second Schedule read with

art. 14(1)(b) of the FC to obtain citizenship by operation of law, dismissed the appellant's application. The High Court found that both her parents were Cambodian nationals at the time of her birth and that she had failed to show that she was not a citizen of any other country at the time of her birth. Hence, this appeal.

Held (dismissing appeal with no order as to costs)

Per Vazeer Alam Mydin Meera JCA delivering the judgment of the court:

- (1) The appellant was born on 3 June 1986 at the Cherating Refugee Camp, Kuantan, Pahang. Hence, the appellant had met the first requirement of being born in the Federation after Malaysia Day under art. 14(1)(b) read together with s. 1(e) of Part II of the Second Schedule of the FC. (paras 13 & 16)
- (2) *Jus sanguinis* is one of the principles that the court looks at to determine whether the appellant through lineage was 'not born a citizen of any country'. If the bloodline or parentage can be ascertained, then the appellant's nationality at the time of birth can be determined by reference to the nationality of her parents. The identity and status of the appellant's maternal and paternal connection had been established, in that, her parents were refugees from Cambodia. In the circumstances, the appellant, though was born on Malaysian soil, would be a person born a citizen of another country, *ie*, Cambodia, by virtue of the principle of *jus sanguinis*. Hence, she would not be stateless at the time of her birth. (paras 20 & 22-24)
- (3) The appellant failed to show why she was not entitled to acquire the citizenship of Cambodia through her father or mother at the time of birth. As such, the appellant could not be a stateless person for the purpose of citizenship by operation of law under s. 1(e) of Part II of the Second Schedule of the FC. Article 14(1)(b) of the FC, read with s. 1(e) of Part II of the Second Schedule, was not applicable to the appellant and the appellant was not a citizen of the Federation by operation of law. (paras 26 & 27)

Obiter:

- (1) The court took note of the fact that the appellant's parents and siblings had all acquired Malaysian citizenship and the appellant was the sole exception. While the court empathise with her predicament, it was still open to her to apply for citizenship by naturalisation, if the legal requirements were met to the satisfaction of the authorities. (para 28)

A Case(s) referred to:

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC (*refd*)
Foo Toon Aik v. Ketua Pendaftar Kelahiran Dan Kematian, Malaysia [2012] 4 CLJ 613 HC (*refd*)

Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong [2021] 5 CLJ 1 CA (*refd*)
Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017]

B 8 CLJ 412 CA (*refd*)

Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [2008] 5 CLJ 42 CA (*refd*)

Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 8 CLJ 16 CA (*foli*)

C Legislation referred to:

Evidence Act 1950, s. 103

Federal Constitution, art. 14(1)(b), Second Schedule Part II para. 1(e)

For the appellant - N Surendran & Shahid Adli Kamarudin; M/s Daim & Gamany

For the respondents - Nik Mohd Noor Nik Kar; SFC & Arina Azmin Ahmad Marzuki; FC

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[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Court Review No: WA-25-06-2019 (*affirmed*).]

Reported by S Barathi

E

JUDGMENT

Vazeer Alam Mydin Meera JCA:

Introduction

F [1] This is an appeal against the decision of the High Court in Malaya dismissing the judicial review application of the appellant which *inter alia* sought the following reliefs:

G (i) an order of *certiorari* to quash the respondents' decision dated 8 March 2019 rejecting the appellant's citizenship application under art. 14(1)(b) of the Federal Constitution read with para. 1(e) Part II, Second Schedule of the Federal Constitution;

(ii) a declaration recognising the appellant as a citizen by operation of law under Second Schedule, Part II, s. 1(e) art. 14(1)(b) of the Federal Constitution;

H (iii) an order of *mandamus* directing the first respondent to issue a MyKad or Certificate of Confirmation of Citizenship that recognises the appellant as a Malaysian citizen by operation of law under art. 14(1)(b) of the Federal Constitution; and

I (iv) a declaration that the respondents have breached the appellant's fundamental rights provided under the Federal Constitution and other provisions of the law.

[2] After careful consideration of oral and written submissions of parties, appeal records as well as relevant authorities, we found no merits in this appeal. We therefore dismissed the appeal and affirmed the decision of the learned High Court Judge. The grounds of our decision are set out below.

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Factual Background

[3] The appellant was born on 3 June 1986 at the Cherating Refugee Camp, Kuantan, Pahang. Both her parents were refugees from Cambodia, and at the time of the appellant's birth, they were not Malaysian citizens. They have since been naturalised as citizens of Malaysia. Since birth, the appellant has lived in Malaysia and is now a permanent resident.

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[4] The appellant applied for Malaysian citizenship pursuant to art. 14(1)(b) of the Federal Constitution read together with s. 1(e) of Part II of the Second Schedule of the Federal Constitution, which was rejected on 8 March 2019. This is the decision that the appellant applied to quash by way of an order of *certiorari* and for an order of *mandamus* directing the first respondent to issue the MyKad or Certificate of Confirmation of Citizenship that recognises the appellant as a Malaysian citizen by operation of law under art. 14(1)(b) of the Federal Constitution in this judicial review application.

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Issues Before The High Court

[5] The appellant's contention is that once the requirements under art. 14(1)(b) read together with s. 1(e) of Part II of the Second Schedule of the Federal Constitution are met, she is automatically a citizen of Malaysia by operation of law. The appellant had referred to the case of *Foo Toon Aik v. Ketua Pendaftar Kelahiran Dan Kematian, Malaysia* [2012] 4 CLJ 613, HC in support of that contention. Learned counsel for the appellant submits that all requirements under s. 1(e) of Part II of the Second Schedule have been met and as such she is a citizen of Malaysia by operation of law under art. 14(1)(b) of the Federal Constitution.

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[6] There were two primary issues for determination by the High Court, namely:

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- (i) whether s. 1(e) of Part II of the Second Schedule, and art. 14(1)(b) of the Federal Constitution were applicable to the appellant; and
- (ii) whether the burden of proof lies on the appellant to establish on a balance of probabilities that the appellant was not born a citizen of any country for the purposes of s. 1(e) of Part II of the Second Schedule.

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Findings And Decision Of The High Court

[7] The High Court held that the appellant had the burden to prove that:

- (i) she was born in Malaysia after Malaysia Day; and
- (ii) that she was stateless at the time of birth.

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A [8] The learned High Court Judge made a finding that the appellant had failed to fulfil the requirements of s. 1(e) of Part II, Second Schedule read with art. 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law.

B [9] The High Court found that, contrary to the appellant's assertion of statelessness, the facts showed that both her parents were Cambodian nationals at the time of her birth and that she had failed to show that she was not a citizen of any other country at the time of her birth. In the circumstance, the High Court dismissed the appellant's application for judicial review.

C **Grounds Of Appeal**

[10] The memorandum of appeal contains several grounds of appeal. However, in the main, they may be summarised as follows:

D (i) the learned High Court Judge had erred in law and fact in her failure to appreciate that the appellant had satisfied the requirements of s. 1(e) of Part II, Second Schedule of the Federal Constitution, read with art. 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law as the appellant:

E (a) was born in Malaysia after Malaysia Day;
(b) had resided in Malaysia her whole life; and
(c) was not a citizen of any country;

F (ii) the learned High Court Judge had erred in her failure to appreciate that there are provisions in domestic and international laws that compel avoidance of statelessness of the appellant; and

(iii) the learned High Court Judge had erred in construing the provisions of s. 1(e) of Part II, Second Schedule of the Federal Constitution by applying the principles of *jus sanguinis*.

G [11] Hence, the issues in this appeal primarily relate to the question of whether the appellant has satisfied the requirements stipulated in s. 1(e) of Part II, Second Schedule of the Federal Constitution, read with art. 14(1)(b) of the Federal Constitution, to obtain citizenship by operation of law, and whether the learned High Court Judge was wrong in her findings of fact and application of the relevant law to the facts in arriving at her decision.

H **Decision Of This Court**

I [12] We agree with the submissions of learned counsel for the appellant that once the requirements under art. 14(1)(b) read together with s. 1(e) of Part II of the Second Schedule of the Federal Constitution are met, she becomes a citizen of Malaysia by operation of law. The question is whether the appellant has met these requirements, which is a question of mixed fact and law.

[13] The learned High Court Judge was quite right when she held that the appellant had the burden to prove the fact of having met the requirements of art. 14(1)(b) read with s. 1(e) of Part II of the Second Schedule of the Federal Constitution.

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[14] The relevant constitutional provisions abovementioned are reproduced below:

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Article 14(1)(b) of the Federal Constitution reads:

- (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

...

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- (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

And s. 1(e) of Part II of the Second Schedule provides:

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

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...

- (e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

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[15] In order to succeed in her application for citizenship by operation of law under art. 14(1)(b) read with s. 1(e) of Part II of the Second Schedule of the Federal Constitution, the appellant has to prove the dual requirements of:

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- (i) being born in the Federation after Malaysia Day; and
(ii) that she is not born a citizen of any other country.

[16] There is uncontroverted evidence that the appellant was born on 3 June 1986 at the Cherating Refugee Camp, Kuantan, Pahang. The appellant's birth certificate is proof of that fact. Hence, the first requirement is met.

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[17] As for the second requirement, the learned High Court Judge referred to the decision of this court in *Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 16; [2017] 5 MLJ 662 and held that for the purposes of s. 1(e) of Part II of the Second Schedule the burden of proof lies on the appellant to establish on a balance of probabilities that the appellant was not born a citizen of any country. See s. 103 of the Evidence Act 1950 and also the cases of *Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 412; [2018] 6 MLJ 548 and *Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [2008] 5 CLJ 42; [2008] 3 MLJ 625.

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A [18] This legal principle is well established and we do not wish to elaborate any further. In order to ascertain whether the appellant had discharged the burden that she was ‘not born a citizen of any country’, the High Court would have to examine the facts and evidence of the case as disclosed in the affidavits filed. This, the learned High Court Judge has done. We find that
B there is comprehensive appreciation of the evidence by the High Court and application of the applicable law.

[19] This court had in *Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 16; [2017] 5 MLJ 662 held that as
C a matter of law any person seeking to rely on art. 14(1)(b) read with s. 1(e) of Part II of the Second Schedule of the Federal Constitution to establish citizenship by operation of law would have to establish the requirements of both *jus soli* and *jus sanguinis*. In this regard, this court had explained that:

[23] Article 14(1)(b) of the Federal Constitution encapsulates the requirement of citizenship by *jus soli* ie place of birth; while para 1(e) of Part
D 11 of the Second Schedule of the Federal Constitution (‘not born a citizen of any country’) encapsulates the requirement of citizenship by *jus sanguinis* ie by blood or lineage.

[24] Thus, it would appear that the second appellant would need to satisfy both the requirements of *jus soli* and *jus sanguinis* in order to fulfil the
E requirements of art. 14(1)(b) and para. 1(e) of Part II, Second Schedule of the Federal Constitution (refer to *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v. Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717).

[25] The doctrines of *jus soli* and *jus sanguinis* were explained in the case of
F *Singh v. Commonwealth of Australia* [2004] HCA 43, which was referred to in the case of *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v. Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717 at p. 747 as follows:

By the late nineteenth century, international law recognised two well established rules for acquiring nationality by birth: *jus soli* and
G *jus sanguinis* (The Australian Legal Dictionary (1997)) defines *jus soli* to mean: a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place; and defines *jus sanguinis* to mean: a right of blood. A right acquired by virtue of lineage. Under
H this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth.

[20] Learned counsel for the appellant submits by reference to the legislative history of art. 14(1)(b) and s. 1(e) of Part II of the Second Schedule of the Federal Constitution that *jus sanguinis*, ie, citizenship by blood lineage,
I is not a requirement or feature of s. 1(e) of Part II of the Second Schedule

of the Federal Constitution. With respect, we are unable to accept that contention. The pronouncement of this court in *Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 16; [2017] 5 MLJ 662 is very clear, in that *jus sanguinis* is one of the principles that the court looks at to determine whether the appellant through lineage was ‘not born a citizen of any country’. We do not find any reason to depart from that decision, and in any event we are bound by the doctrine of *stare decisis* to follow that decision. See: *Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong* [2021] 5 CLJ 1, CA; *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645, FC.

[21] Further, as to whether *jus sanguinis* is a necessary feature in an application for citizenship under para. 1(e) of Part II of the Second Schedule of the Federal Constitution, this court had in *Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 16; [2017] 5 MLJ 662 said:

[27] The contentious issue is in respect of the requirement of *jus sanguinis* in para. 1(e) of Part II of the Second Schedule of the Federal Constitution, as expressed by the phrase, ‘who is not born a citizen of any country’. For the purposes of this requirement the material time to determine the status of the second appellant’s lineage is at the time of his birth.

...

[35] A plain reading of para. 1(e) ‘was not born a citizen of any country’ refers to the relationship of the second appellant to his biological and lawful parents at the time of his birth. ...

[22] Thus, if the bloodline or parentage can be ascertained, as in this case, then the appellant’s nationality at her time of birth can be determined by reference to the nationality of her parents. Her lineage and the citizenship laws governing her parents’ nationality would be relevant to determine whether or not the appellant fulfils the requirement that she ‘was not born a citizen of any country’. In that event, the appellant though born on Malaysian soil, would be a person born a citizen of another country, *ie*, Cambodia, by virtue of the principle of *jus sanguinis*. Hence, she would not be stateless at the time of her birth.

[23] In this regard, we concur with the High Court that the appellant has to prove that she was stateless at the time of her birth to avail of her rights under s. 1(e) of Part II of the Second Schedule of the Federal Constitution. The facts show that her parents were refugees from Cambodia. Thus, there was evidence of the parents’ country of origin. Though the appellant’s birth certificate issued by the first respondent did not state the nationality of her parents, that does not mean that her parents were stateless. The burden to proof that fact rests upon the appellant.

A [24] Here, the identity and status of the appellant's maternal and paternal connection have been established. There is documentary evidence establishing this. The Permit Masuk for the appellant's father's permanent residence in Malaysia issued by the Jabatan Imigresen Malaysia states the nationality of the appellant's father as "Kampuchea", *ie*, Cambodia. This information could only have been given by the appellant's father when applying for permanent residence, and the fact of her father's Cambodian nationality then is not refuted by the appellant.

C [25] Now, if that were so, then the appellant has to show why she is not entitled to acquire the citizenship of Cambodia through her father or mother at the time of birth, *ie*, through the principle of *jus sanguinis*. The learned High Court Judge found that the appellant had failed to discharge that burden. This is very well stated by the learned High Court Judge in paras. 18 to 20 of the grounds of judgment:

D [18] The Applicant still has to establish on balance of probabilities that she is a stateless person ... The country by which she has a relevant link must be viewed by her birth, descent, and marriage of her parents to determine whether she is truly a stateless person. The Applicant had to prove (*sic*) that she is stateless as her parents were still Cambodian citizens when the Applicant was born.

E [19] This Court agrees with the Respondents' submission that to acquire citizenship under paragraph (e) of Section 1 of Part II, the Applicant must not be born a citizen of any other country. Whether she acquires citizenship of Malaysia or otherwise in other countries by virtue of her parents' origin would depend on the law of citizenship of her parents. If the said country's law does not confer citizenship on her, only then would she be considered for citizenship under paragraph (e) of Section 1 of Part II.

G [20] The Court cannot easily declare the Applicant as a stateless child and grant citizenship under Section 1(e) of Part II, Second Schedule of the Federal Constitution as the status of the paternal and maternal origin has been determined and is undisputed. It is the view of the Court that at this juncture, the Applicant had not discharged that burden. As such, the Applicant could not be considered a stateless person for the purpose of citizenship by operation of law under Section 1(e) of Second Schedule.

H [26] We do not find any fault in that reasoning, and we agree with the learned High Court Judge that it is incumbent upon the appellant to demonstrate to the court why she is not entitled to Cambodian citizenship at birth. This the appellant had failed to do. As such, the appellant could not be said to be a stateless person for the purpose of citizenship by operation of law under s. 1(e) of Part II of the Second Schedule of the Federal Constitution.

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[27] Thus, we agree with the learned High Court Judge that art. 14(1)(b) of the Federal Constitution, read with s. 1(e) of Part II of the Second Schedule, are not applicable to the appellant, and that on the available evidence the appellant is not a citizen of the Federation by operation of law. To that extent we do not find any error on the part of the learned High Court Judge that would warrant appellate intervention.

[28] We have taken note of the fact that the appellant's parents and siblings have all acquired Malaysian citizenship, and that the appellant is the sole exception. We empathise with her predicament. Nevertheless, it is still open to her to apply for citizenship by naturalisation, if the legal requirements are met to the satisfaction of the authorities.

[29] In the premise of the foregoing, we dismissed the appeal with no order as to costs.

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